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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JODY JAMES DUNN,

Defendant and Appellant.

B213397

(Los Angeles County
Super. Ct. No. BA322407)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Sam Ohta, Judge. Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jody James Dunn appeals from a judgment entered after a jury convicted him of count 1, arson of an inhabited structure. (Pen. Code, § 451.1, subd. a).)¹ The jury found true the allegation that a firefighter suffered great bodily injury. (§ 451.1, subd. (a).) The trial court found true the allegations that appellant had suffered three prior strike convictions (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i) (the “Three Strikes” law)) and three prior serious felony convictions (§ 667, subd. (a)(1)).

The trial court sentenced appellant to state prison for a determinate term of 20 years plus an indeterminate term of 28 years to life. The determinate term was calculated as the upper term of five years for the true finding on the section 451.1, subdivision (a) allegation and an additional five years for each of the three prior convictions found true pursuant to section 667, subdivision (a)(1). The indeterminate term of 28 years to life was calculated pursuant to section 667, subdivision (e)(2)(A) as the upper term of eight years for count 1, plus five years for the true finding on the section 451.1, subdivision (a) allegation, plus five years for each of three prior convictions found true pursuant to section 667, subdivision (a)(1).

Appellant contends that the trial court abused its discretion by denying his motion to dismiss his prior strikes and erred in failing to sua sponte instruct the jury on the causation requirement for the section 451.1 great bodily injury enhancement. We disagree with appellant’s contentions and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

On May 8, 2007, around 6:30 a.m., appellant started a fire in his apartment by lighting his shirt on fire and throwing it into his closet. Dianna Rideout, who lived directly below appellant’s apartment, heard stomping noises and the sound of glass breaking. She walked outside her apartment and saw smoke and flames coming out of appellant’s apartment door. She saw appellant exit his apartment and lean his back

¹ All further statutory references are to the Penal Code unless otherwise indicated.

against the railed balcony that faced an inner courtyard. Rideout telephoned the fire department, screamed warnings to the other residents, and yelled at appellant who did not respond or attempt to put out the fire, but just continued to watch.

Jason Luther, a resident who lived in an apartment across from appellant, awoke to a commotion. He exited his apartment and saw the fire in appellant's apartment. Appellant was standing against the railing with his arms crossed, facing his burning apartment. In reply to Luther's question of whether there was someone in the apartment, appellant responded in the affirmative. Appellant was calm, showed no emotion, and did not attempt to put out the fire. Luther called out to see if there was anyone in appellant's apartment and took a few steps inside, but was forced to back away by the flames. He later received treatment for smoke inhalation.

Pamela Hewitt, the apartment manager, saw appellant leaning against the railing with his arms crossed, watching the fire. Appellant did not make any move to use a fire extinguisher near him although Hewitt yelled at him to do so. Appellant told Hewitt "I hope everybody in this building dies." Appellant walked down the stairs appearing unconcerned and disconnected.

Los Angeles Police Department Officer William Young took appellant into custody. Neither Hewitt nor Officer Young saw anyone try to harm appellant, who did not appear to be injured in any way. After being read his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, appellant told Officer Young that he started the fire because he was angry at people who were bothering and harassing him, and he wanted to go back to jail. He told Officer Young that he took off his shirt, lit it on fire, and threw it in his closet. At the police station, appellant prepared a written statement. He wrote, "I start the fire with a shirt, which I put in the closet with my clothes by bed in the bedroom. Items being stolen out of my apartment being mess with, and since people want me in jail, so be it."

Los Angeles Fire Department Firefighter Sean Welch responded to the fire and began hooking up a fire hose to a fire hydrant. Welch testified that hydrants are very

dangerous to work with because valves, caps, and stems can break and shoot off. The hydrant is under very high pressure and broken parts can become projectiles that can injure people. Welch testified that he remembered tightening a 35-pound valve on the hydrant. The next thing he knew, he woke up in the emergency room at Cedars Sinai Hospital. Welch had suffered a broken left radius, a cracked left ulna, broken left thumb, broken right clavicle, collapsed right lung, a hematoma on his forehead, and a concussion. Welch was hospitalized for four days, and underwent corrective surgery and six months of physical therapy. As a result of his injuries, Welch suffers from a 3 percent disability in his wrist and a 3 percent disability in his shoulder. He has large scars on his wrist and shoulder where metal plates were inserted. Asphalt remains lodged in his forehead and lips.

Arson investigator Justin Davis determined that the fire originated from appellant's bedroom closet. He ruled out accidental, mechanical, natural, or electrical causes of the fire, concluding that it was deliberately set.

Before trial, the trial court declared appellant incompetent to stand trial. The proceedings were suspended for several months while appellant underwent psychiatric treatment. The proceedings were reinstated when appellant's competency was restored. Prior to sentencing, the trial court denied appellant's motion to dismiss his prior strikes.

DISCUSSION

I. The trial court properly exercised its discretion in denying appellant's motion to dismiss his prior strikes

Appellant contends that the trial court abused its discretion by refusing to dismiss any of his strike priors because his history of mental illness reduced his culpability. We disagree.

Section 1385 authorizes the trial court to strike prior convictions in "furtherance of justice." The term "'furtherance of justice,' requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People*, in determining whether there should be a dismissal. [Citations.]" (*People v.*

Superior Court (Romero) 13 Cal.4th 497, 530.) The courts must recognize society's legitimate interest in the fair prosecution of crimes properly alleged by refraining from arbitrarily cutting those rights without a showing of detriment. (*Id.* at p. 531.) A trial court abuses its discretion if it strikes a prior conviction allegation simply because a defendant pleads guilty; or because it may have a personal antipathy for the harsh sentencing result that the Three Strikes law would have on the defendant while ignoring the defendant's background, the nature of his present offense, and other individualized considerations. (*Ibid.*)

However, our role is not to substitute our judgment for the trial court but to determine whether the trial court acted in an arbitrary, capricious, or patently absurd manner that results in the manifest miscarriage of justice. (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1433–1434.) In the absence of such a showing we must presume that the trial court acted to achieve legitimate sentencing objectives and we may not set aside the trial court's discretionary determination to impose a particular sentence. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977–978 [disapproved on other grounds in *People v. Williams* (2005) 35 Cal.4th 817, 832].)

At the hearing on appellant's motion to dismiss his prior strikes, defense counsel requested that appellant be dealt with under the Proposition 36 Substance Abuse and Crime Prevention Act of 2000 or a diversion program or that entry of judgment be deferred. The record shows that the trial court considered appellant's motion, arguments of counsel, and appellant's past criminal history and current crime in concluding that appellant did not fall outside the spirit of the Three Strikes law. The trial court stated that it understood its discretion to strike a prior as well as its obligation to consider the circumstances surrounding the prior convictions, the facts of the current case, and the background, prospects, and character of the defendant. It noted that the facts underlying appellant's prior convictions did not mitigate in favor of striking a prior: one concerned a residential burglary during which appellant had stolen over \$1,000 worth of property, one concerned carjacking a woman at knifepoint, and one concerned assault with a firearm.

The trial court did not find persuasive defense counsel's argument that the crimes were remote in time. The trial court noted that appellant had spent 15 years in federal custody after the last of his qualifying prior convictions. Upon release, he did not remain crime-free, but was convicted of a misdemeanor crime of causing corporal injury to a cohabitant. The trial court also found that as soon as appellant became an adult he began to commit serious felonies for which he was incarcerated.

Despite appellant's argument on appeal that the trial court disregarded the extent to which appellant's mental illness rendered him less responsible for his conduct, the record reflects that the trial court addressed appellant's argument that he suffered from a mental illness and needed help. The trial court noted that appellant's mental illness was not a defense, which appellant acknowledges. The trial court found that appellant's mental illness caused appellant to act in a manner that exposed a great number of people to extreme danger. The trial court concluded that appellant and others like him, who lack concern for their own safety or welfare, pose the greatest danger to society. The record reveals that the examining psychiatrist reported that appellant's girlfriend stated that he did well while on federal probation because he was required to take his medications. The girlfriend also stated that when appellant's federal probation ended, he stopped taking his medications and his behavior became increasingly erratic, hostile, and unpredictable. Appellant's refusal to treat his illness supports the trial court's determination that his mental illness was not a factor militating in favor of dismissal of one or more of the strikes.

Nor do we find persuasive appellant's argument on appeal that although he did not express remorse, his confession shows that he felt guilt. While a voluntary acknowledgment of a wrongdoing before arrest or at an early stage of the criminal process can be a mitigating factor under California Rules of Court, rule 4.423(b)(3), appellant's confession that he started the fire to avenge himself on people who were stealing from him and who wanted him in jail does not appear to be a mitigating

circumstance. We find the trial court's decision was properly based on appellant's background, the nature of his present offense, and other individualized considerations.

While we sympathize with appellant's struggle with his mental illness, we are satisfied that the trial court did not abuse its discretion in denying appellant's motion to strike a prior conviction.

II. The trial court adequately instructed the jury

Appellant contends that the trial court erred in failing to sua sponte instruct the jury with CALCRIM No. 240 on causation as it pertained to the great bodily injury allegation. We disagree.

Appellant did not object below that the instructions given should have been amplified or modified and therefore has forfeited his challenge to the completeness of the instruction. (*People v. Riggs* (2008) 44 Cal.4th 248, 309.) However, appellant argues that even in the absence of a request, the trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case. (*People v. Guivan* (1998) 18 Cal.4th 558, 569.)

We find that CALCRIM No. 240 was not required for the jury's understanding of the case. The trial court instructed the jury with CALCRIM No. 1502 which defines the elements of arson. As given, it provides: "The defendant is charged in Count 1 with arson that burned an inhabited structure in violation of Penal Code section 451(b). [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant set fire to or burned a structure; [¶] He acted willfully and maliciously; AND [¶] The fire burned an inhabited structure. [¶] To set fire to or burn means to damage or destroy with fire either all or part of something, no matter how small the part. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. [¶] Someone acts maliciously when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to defraud, annoy, or injure someone else. [¶] A

structure is any building. [¶] A structure is inhabited if someone lives there and either is present or has left but intends to return.”

The trial court also instructed the jury with CALCRIM No. 1551 which sets forth what the People must establish to prove the great bodily injury allegation. The jury was instructed as follows: “If you find the defendant guilty of arson as charged in Count 1, you must then decide whether the People have proved the additional allegation that: [¶] A firefighter suffered great bodily injury as a result of the arson. [¶] A firefighter includes anyone who is an officer, employee, or member of a governmentally operated fire department in this state, whether or not he or she is paid for his or her services. [¶] Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. [¶] The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.”

Appellant contends that the absence of CALCRIM No. 240 prevented the jury from determining whether appellant’s act of setting the fire caused Welch’s injury. He argues that as a result, the jury was forced to accept the prosecutor’s “but for” causation argument. CALCRIM No. 240 provides: “An act causes (injury/_____) if the (injury/_____) is the direct, natural, and probable consequence of the act and the (injury/_____) would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence. [¶] [There may be more than one cause of (injury_____). An act causes (injury/_____), only if it is a substantial factor in causing the (injury/_____). A substantial factor is more than a trivial or remote factor. However, it does not have to be the only factor that causes the (injury/_____).]

By arguing that CALCRIM No. 240 applies, appellant mixes the concept of an independent intervening act with criminal responsibility. CALCRIM No. 240 applies when causation is at issue, not when the question is whether the defendant was

responsible for an unlawful act which resulted in an injury. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1056 [CALJIC Nos. 3.40 and 3.41 are applicable where there is a possibly independent intervening act that supersedes proximate causation by the proven criminal acts; they are not applicable where the defendant’s responsibility was one of complicity, not causation].) Here, the evidence showed that Welch was injured as a direct result of appellant’s criminal acts. Thus, the only issue was whether appellant set the fire deliberately and maliciously, or accidentally. Despite appellant’s speculation that Welch “[could] have been mugged, or the fire hydrant was defective, or he removed it wrongly,” the issue of an independent intervening act that would have made CALCRIM No. 240 applicable, did not exist here.

DISPOSITION

The judgment is affirmed.

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_____, J.
DOI TODD

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST